No. 93-444

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CITIES OF PALO ALTO, REDDING, ROSEVILLE, BIGGS AND GRIDLEY, CALIFORNIA, AND PLUMAS SIERRA RURAL ELECTRIC COOPERATIVE, INC.,

Petitioners,

v.

HAZEL R. O'LEARY, SECRETARY OF ENERGY, WESTERN AREA POWER ADMINISTRATION OF THE DEPARTMENT OF ENERGY, AND WILLIAM CLAGETT, ADMINISTRATOR OF THE WESTERN AREA POWER ADMINISTRATION,

ARVIN-EDISON WATER STORAGE DISTRICT; BANTA-CARBONA IRRIGATION DISTRICT; BYRON-BETHANY IRRIGATION DISTRICT; GLENN-COLUSA IRRIGATION DISTRICT; JAMES IRRIGATION DISTRICT; SAN LUIS OBISPO WATER DISTRICT; WEST SIDE IRRIGATION DISTRICT; TRINITY COUNTY PUBLIC UTILITIES DISTRICT; HAYFORK VALLEY PUBLIC UTILITY DISTRICT; CALAVERAS PUBLIC POWER AGENCY; TUOLUMNE COUNTY PUBLIC POWER AGENCY; BUREAU OF ELECTRICITY OF THE CITY OF ALAMEDA; AND THE CITIES OF LODI, LOMPOC, UKIAH AND HEALDSBURG, CALIFORNIA,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the appellate court in reversing the decision of the district court with respect to the meaning of the term "nonwithdrawable" as used in a settlement agreement improperly applied the "clearly erroneous" standard of review of Rule 52(a) of the Federal Rules of Civil Procedure by failing to give proper deference to the district court's findings of fact, weighing the extrinsic evidence *de novo*, disregarding evidence contradicting the appellate court's findings of fact and conclusions of law, and substituting the appellate court's judgment for that of the district court based upon the appellate court's findings of fact and conclusions of law that are erroneous.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Cities of Palo Alto, Redding, Roseville, Biggs and Gridley, California, and Plumas Sierra Rural Electric Cooperative, Inc. ("Cities") respectfully request that a writ

of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed January 28, 1993.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is printed in the Appendix (concurrently filed herewith) as Appendix A at pages 1a to 15a, and is reported in 984 F.2d 1008 (1993). The order of the Ninth Circuit denying Cities' petition for rehearing and rejecting the suggestion for rehearing *en banc*, filed June 23, 1993, is printed as Appendix B at page 16a. The findings of fact and conclusions of law of the United States District Court for the Northern District of California, filed August 20, 1990, are printed as Appendix C at pages 18a to 30a.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 52(a) of the Federal Rules of Civil Procedure (28 U.S.C.) provides:

> ". . . Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . ."

Section 4 of Trinity River Division, Central Valley Project, Act of August 12, 1955, ch. 872, 69 Stat. 719 (Appendix D at page 31a) and Section 203 of the Flood Control Act of October 23, 1962, Public Law 87-874, 76 Stat. 1173 (Appendix E at page 33a).

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[1] The names of all parties to the proceeding appear in the title of the case.

STATEMENT OF THE CASE

This proceeding is a phase of a lawsuit begun in July 1975 by the City of Santa Clara ("Santa Clara") challenging the lawfulness of the Bureau of Reclamation's ("Bureau")[2] reduction of Santa Clara's contract rate of delivery by withdrawal of its allocation of Central Valley Project ("CVP") power and the refusal to grant Santa Clara the "same kind of allocation that Palo Alto,Redding and SMUD [Sacramento Municipal Utility District] had."[3] (A.E.R.47[4]; material in brackets supplied). Santa Clara's initial 75 mw allocation of CVP power was subject to withdrawal for the needs of the customers to which the power was previously allocated but was presently unused by them, for project use[5] and for the first preference of Trinity County[6] (A.E.R.190,193).

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[2] The Bureau was the Department of Interior's marketing agent for the sale of power and energy from the CVP until October 1977, when the Department of Energy was created and the marketing functions of the Bureau were transferred to Western Area Power Administration ("Western"). 42 USC §7152(1)(E). Hereinafter "Western" refers to the Bureau and to Western. Reference to events prior to October 1977 involve the Bureau and since October 1977 involve Western.

[3] SMUD's allocation of 290 mw, as conceded by Western, is not subject to withdrawal for any reason. Western's General Counsel Hine and its Mr. Magaw testified the allocation is, therefore, properly described as "nonwithdrawable" (RT92-93, 7/19/90; RT184,7/23/90). Since 1967, the CVP power allocations of Palo Alto, Redding, Roseville, Biggs, Gridley and Plumas Sierra, known collectively as the "load growth" customers (*infra*, 16), were also "nonwithdrawable", and were so regarded by Santa Clara. Santa Clara was seeking a "nonwithdrawable" allocation of CVP power in its lawsuit.

[4] "A.E.R." refers to Appellees ["Cities"] Excerpt of the Record before the appellate court.

[5] "Project use" refers principally to the power used to operate CVP pumping facilities, but also includes power plant use for lighting and other uses, such as for employees' living quarters (RT46-47,7/23/90; Hood Depo, p. 13).

[6] The statute authorizing construction of the Trinity River Division generating plants granted a first preference to the preference customers in Trinity County, subject to certain conditions, of up to 25 percent of the power generated. 69 Stat. 719 (Act of August 12, 1955) (Appendix D at 31a).

By 1971, when Santa Clara's contract rate of delivery (or "CRD")[7] was at 120 mw, Western began withdrawals. When Santa Clara's CRD was reduced by withdrawals to 71.4 mw, Santa Clara filed its lawsuit. The district court granted and denied in part cross-motions for summary judgment and remanded the case to the Secretary of Interior for the promulgation of rules and procedures for the marketing of CVP power (App.C at 19a; *City of Santa Clara v. Kleppe*, 418 F.Supp. 1243 (N.D.Cal.1976), reversed and remanded, Santa Clara v. Andrus, 572 F.2d 660 (1978).

On cross-appeals to the Ninth Circuit, that court held, *inter alia*, that the Secretary's discretion with respect to the allocation of CVP power was not reviewable. The Ninth Circuit ruled, however, that the sale of power to Pacific Gas & Electric Company ("PG&E"), a non-preference entity, was unlawful if there is a preference entity ready, able and willing to use that power because the statute governing the disposition of CVP power mandates such a preference (43 U.S.C. §485h(c)).[8] The Ninth Circuit returned the case to the district court to determine whether Santa Clara met these criteria for purchase of the power sold to PG&E. *City of Santa Clara v. Andrus*, 572 F.2d 660, 672, 677 (9th Cir. 1978), *cert. denied*, 439 U.S. 859, 58 L.Ed.2d 167 (1978).

Cities participated in the Ninth Circuit as *amici curiae*, supporting reversal of the district court's ruling on reviewability of the Secretary's actions.[9] On remand to the district court, Cities were granted intervention.

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[7] CRD is the maximum amount of power the customer is entitled to receive (RT159-160,7/23/90).

[8] Section 485h(c) provides that a "preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans pursuant to the Rural Electrification Act of 1936 [7 U.S.C.A. §901 et seq.]."

[9] In a pleading filed in the Ninth Circuit in 1978, when no issue as to the status of Cities' allocations of CVP power was involved, Cities described their CVP allocations of power as "permanent allocations, i.e., are not subject to withdrawal" (A.E.R.118).

Following the remand, negotiations were undertaken to settle the litigation.[10] Santa Clara insisted upon a "non-withdrawable" allocation such as Cities had. Cities' "non-withdrawable" load growth allocations were the only source of such an allocation. Cities agreed to relinquish part of their valuable load growth allocations provided Western agreed to divide Cities' remaining load growth, which was allocated to Cities as a group, into specific allocations of load growth for each city. Thereby each city would acquire certainty as to a specific level of load growth. Western agreed to Cities' proposal. Cities then negotiated a 65 mw allocation for Santa Clara. Thereafter, Santa Clara and PG&E agreed on a division of the escrow fund which had accumulated during the litigation.[11] Western, in turn, reached agreement with PG&E on Western's "wish list" which were all matters unrelated to the litigation. One such matter was an increase in PG&E's contractual obligation to support a simultaneous demand of all customers from 1050 mw to 1152 mw, which would significantly increase the cost of CVP power to Cities and all other preference customers.[12]

A Memorandum Of Understanding ("MOU"), dated February 8, 1980, and a Mutual Release were agreed to. The MOU was approved by the district court which reserved jurisdiction to enforce the MOU in accordance with its terms. The present dispute arose when Western finally in 1985 tendered contracts purporting to carry out the terms of the MOU. Cities objected to the proffered provisions for withdrawal of Cities' allocations for project use and the first preference of the Counties of Trinity, Calaveras and Tuolumne on the ground that Cities' allocations under the

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[10] Concerned that the sales to PG&E in lieu of to Santa Clara could not be justified and worried about liability to Santa Clara in that event, Western pressed for settlement (A.E.R. 196-98).

[11] Santa Clara had paid the difference between the cost of PG&E power and CVP power into an escrow fund. The fund was $85 million.

[12] The additional 102 mw increase, which PG&E agreed to, would increase the cost of power to Cities' and all CVP customers by at least $1,698 million (P.E.No. 27, page numbered 14).

MOU are "nonwithdrawable", i.e., not subject to withdrawal for any reason. Palo Alto and, subsequently, Redding, Roseville and Plumas Sierra, filed applications with the district court for enforcement of the MOU in accordance with Cities' position. Western opposed the applications, claiming, as it had in the court litigation with Santa Clara, that "nonwithdrawable" power in the MOU means "firm" power (Orig. 1985 Record at 228).[13]

In an order of October 11, 1985, the district court ruled in Cities' favor that under the MOU Cities' allocations were not subject to withdrawal. Western appealed to the Ninth Circuit. Without reaching the merits, the Ninth Circuit remanded the case to the district court with instructions to admit Arvin Edison Water Storage District ("Arvin-Edison") which had participated in the appeal as an *amici curiae*, as an intervenor, to enable it to present evidence it claimed to have showing the district court's interpretation of the MOU was in error.[14] The district court admitted Arvin-Edison as an intervenor as well other irrigation districts, preference entities of the Counties of Trinity, Calaveras and Tuolumne, and five cities, identified in the title of this case, although they had no knowledge or evidence bearing on the meaning of "nonwithdrawable" in the MOU, had no participation in the negotiations, the preference entities for the three counties were not in existence at the time of the negotiations, and the five cities were not CVP

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[13] Firm power means power that is available to the customer on demand at all times during the contract term. *Glossary of Important Power and Rate Terms, Abbreviations, and Units of Measurement*, Federal Power Commission, 1965, pp. 1 and 13. In the litigation with Santa Clara, the Ninth Circuit also referred to "nonwithdrawable power" as meaning "firm power". 572 F.2d at 663. "Orig. 1985 Record" citation refers to Western's excerpts of record that were before the Ninth Circuit in *Santa Clara v. Herrington, et al.*, No. 85-2899,Ninth Circuit, which resulted in the Ninth Circuit's remand on procedural grounds. That record was incorporated by reference as part of the district court's trial record.

[14] The further proceedings before the district court revealed that Arvin Edison had no evidence of its own on the subject, notwithstanding its representation to the Ninth Circuit.

customers until years later (RT283,7/24/90; A.E.R. 5,6,7,14,16,18,23,29; CR.463,Jt.Pre-Trial Statement, Undisputed Facts, Nos. 9,10, p. 15). Following a four day trial, the district court issued Findings of Fact and Conclusions of Law sustaining for the second time Cities' position respecting the interpretation of "nonwithdrawable" as used in the MOU.

Western, and the intervenors supporting Western's position, appealed. On appeal the Ninth Circuit reversed the district court, violating Rule 52(a) of the Federal Rules of Civil Procedure, by substituting its judgment for that of the district court on the basis of its interpretation, which is erroneous, of the 1967 amendments to Cities' contracts and upon a series of findings and conclusions, all of which are erroneous and, as hereinafter shown, led the appellate court to an erroneous reversal of the district court.

REASONS FOR GRANTING THE WRIT

Decisions of this Court, reversing decisions of federal courts of appeal for their failure properly to comply with Rule 52(a) of the Federal Rules of Civil Procedure's "clearly erroneous" standard of review, emphasize the importance of adherence to the strictures of that rule. As this Court has stated, the considerations underlying Rule 52(a) are the demands of judicial efficiency, the expertise developed by the trial judges and the importance of first hand observation. *Anderson v. Bessemer City*, 470 U.S. 564, 574-75, 84 L.Ed.2d 518 (1985).

The appellate court's decision in this case is a particularly egregious failure to adhere to the strictures of Rule 52(a) as enunciated by this Court. Not only has the appellate court failed to give proper deference to the district court's findings of fact, but, in second guessing the district court, the appellate court engaged in *de novo* review of the extrinsic evidence, disregarded all extrinsic evidence that undermined its analyses, substituted its judgment for that of the trial court as though the appellate court were the trial court, and contrary to law has reversed the district court

on the basis of the appellate court's findings of fact and conclusions of law that are clearly erroneous and led it into error.

The consequences of the appellate court's errors and reversal portend severe consequences for Cities and their consumers. App.K at 60a. In agreeing to give up 65 mw, having a minimum value of $100,000,000 over their contract's remaining years, which 65 mw Cities were in no danger of losing, Cities made possible the settlement of the original litigation. Cities only *quid pro quo* therefor were the specific allocations of power for each of Cities. Western's Administrator, in hailing the settlement with praise for Cities in making settlement possible, described these allocations of power under the MOU as allocations Cities could "count on to meet future load growth." (A.E.R. 205,211).

The appellate court's reversal deprives Cities of that only benefit and subjects their power allocations to reduction or elimination through withdrawal in contradiction of Western's commitment and of the MOU to "nonwithdrawability" of Cities' load growth allocations.

The appellate court's decision confronts the Cities and its customers with significant costs of replacement power. Palo Alto and its consumers, for example, face estimated cost increases of $169 million for the remaining period of the contract, 1994 through 2004.[15]

I. THE APPELLATE COURT VIOLATED THE "CLEARLY ERRONEOUS" STANDARD OF REVIEW BY SUBSTITUTING ITS JUDGMENT ON ERRONEOUS FACTUAL DETERMINATIONS AND CONCLUSIONS OF LAW FOR THE TRIAL COURT'S WELL-SUPPORTED FINDINGS AND JUDGMENT

Findings of fact, as the appellate court acknowledged, are "reviewed under the clearly erroneous standard." (App.A at 9a). Decisions of the Supreme Court and of the

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[15] Appendix K at 60a provides the estimated increased cost of power for each of Cities and other data respecting Cities.

Ninth Circuit emphasize that this standard "plainly does not entitle a reviewing court to reverse the findings of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573, 84 L.Ed.2d 518, 528(1985); *Amadeo v. Zant*, 486 U.S. 214, 223, 100 L.Ed.2d 249, 260-61(1988); *Magna Weld Sales Co. v. Magna Alloys & Research PTY, Ltd.*, 545 F.2d 668, 671(9th Cir. 1976); *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 72 L.Ed.2d 66,78(1982). The appellate court's function is not to decide factual issues *de novo*. (*Anderson, supra*, at 573). The standard is a "deferential standard", which means that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." (*Anderson, supra*, at 574; *United States v. Babbs*, 483 F.2d 308, 312 (9th Cir. 1973)). "This is so even when the district court's findings do not rest on credibility determinations, but are based on physical or documentary evidence or inferences from other facts." (*Anderson, supra*, at 574). "The rationale for deference to the original founder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility." *Anderson, supra*, at 574. The major role of the trial judge is the determination of fact and with experience in fulfilling that role come expertise. Id; *In re James E. O'Connell Co., Inc.*, 799 F.2d 1258, 1260-61(9th Cir. 1986). As *Komie v. Buehler Corp.*, 449 F.2d 644, 647(9th Cir. 1971), ruled,under the "clearly erroneous" standard of review, the appellate court—

> "must view the evidence *in the light most favorable" to the prevailing party and "such a party must be given the benefit of all inferences that may reasonably be drawn from the evidence*" (citation omitted; emphasis supplied)

See also *United States v. Babbs, supra*, at 312.

The appellate court's decision, which includes little or no discussion of the relevant evidence on which the district court rested its interpretation of "nonwithdrawable", or of any of the extrinsic evidence, discloses that the appellate

court set aside the district court's findings of fact without determining them to be "clearly erroneous", and substituted its own fact determinations and conclusions of law, which as shown hereinafter are erroneous.

The district court found the evidence inconclusive with respect to the status of Cities' allocations under the 1967 amendments of Cities' 1963 contracts. Cities contended their allocations of power became "nonwithdrawable", as a result of the 1967 amendments to Cities' contracts which amendments fulfilled Western's commitment to Cities in 1964, *infra*, 16-18. On the other hand, Western contended the 1967 amendment made Cities' allocations of power subject to withdrawal for project use, the first preference of Trinity, Calaveras and Tuolumne Counties, and for load level protection, referred to as "the three stated purposes". The district court found it unnecessary to determine conclusively which interpretation of the 1967 amendment was correct, finding that the 1967 amendments were reasonably susceptible of either interpretation (App.C, at 24a-25a).

The district court on the evidence rejected Western's attempt to sustain its position by asserting that "nonwithdrawable" as used in the MOU is a term of art, which through custom and usage meant subject to withdrawal for the three stated purposes.[16] The district court found "de-

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[16] At all times before the district court, Western contended that the three stated purposes were withdrawals for project use, the first preference of preference customers in the Counties of Trinity, Calaveras, and Tuolumne, and load level protection, asserting that *all* Western contracts subjected the allocations to withdrawal for these three purposes. Contradicted by the extrinsic evidence and admissions of its own witnesses on cross-examination that in no contract were power allocations subject to withdrawal for the three stated purposes and that in some contracts the allocations were not subject to withdrawal at *all*, Western changed its contention at the appellate level. It there contended that *all* contracts provided "in one form or another" for withdrawal of project use and for first preference entitlements of entities "in *one* or *more* of the counties of origin." (emphasis supplied). Even as modified the argument is false. Allocations are not subject to withdrawal in all contracts and the customers are properly described as having "nonwithdrawable" allocations (infra, 11, 24-25).

terminative" that "nonwithdrawable" was not a term of art and that before and during the negotiations of the MOU "there was no established meaning of the word 'nonwithdrawable' different from the ordinary meaning one would impart to the word, i.e., not withdrawable for *any* reason" (App.C, at 25a; emphasis the district court's). The district court further found (App.C at 25a) that "[i]f . . . nonwithdrawable was intended to mean not subject to other CVP customer's [needs] but subject to withdrawal for the three stated purposes, the MOU would have included a definition clearly expressing this meaning because the evidence presented to the court does not establish the word had acquired this special meaning through custom and usage." That decision was soundly based on the admissions of Mr. Hine (Western's General Counsel) and of Mr. Magaw (formerly a Western Staff Attorney and at trial the Assistant Area Manager for Power Marketing) that "nonwithdrawable" correctly describes an allocation not subject to withdrawal for any reason, such as SMUD's 290 mw allocation, concededly not subject to withdrawals (RT92-93,7/19/90; RT156,295,7/23,24/90). If "nonwithdrawable" were a "term of art", Mr. Hine agreed, "nonwithdrawable" should have been defined in the MOU (RT15-16,7/20/90). In the absence of a definition of a term claimed to be a "term of art", he agreed that the reasonable inference is that the term was being used in its common and ordinary sense (RT16,7/20/90) and that it is normal practice in the absence of a definition to ascribe that meaning to "nonwithdraw.able" (RT21-22,7/20/90). On this testimony alone the district court's finding that "nonwithdrawable" was used in its common and ordinary sense required affirmance as not "clearly erroneous". Moreover, as the district court also found, if "nonwithdrawable" were ambiguous, the result would be the same since under California law the contract should be interpreted most strongly against Western, the cause of the ambiguity (App.C at 29a, Finding of Fact 11). The appellate court ignored these factual findings and conclusions and this important principle of California law (Cal. Civil Code §1654), although declaring "nonwithdrawable" to

be ambiguous (App.A at 10a). If, as the appellate court asserted, "nonwithdrawable" is ambiguous, the appellate court erred in reversing the district court and misapplied Rule 52(a), for where there are two permissible views of the evidence, the factfinder's choice between them cannot be "clearly erroneous". *Anderson*, *supra*, at 574.

Coupled with the testimony of Western's Hine and Magaw, and the undisputed evidence (Magaw Depo. 103-106, 8/2/89) that "nonwithdrawable" had never been used by Western in any of the CVP contracts or in any internal memoranda or correspondence to describe either the contract or the power allocation (RT15,7/20/90; A.E.R. 2,20,37,51-66,227-235; Magaw Depo. 100, 8/2/89), the district court's findings of fact and conclusion of law interpreting the MOU were fully supported and should have been affirmed. These findings were entitled to, but did not receive, deference from the appellate court. Nor did the appellate court, in conflict with decisions of this Court and of its own circuit, view the evidence in the light most favorable to Cities, the prevailing party, and give Cities the benefit of all inferences that may reasonably be drawn from the evidence. *Komie v. Buehler Corp.*, *supra*. Instead, the appellate court reversed the decision of the district court based on erroneous findings and conclusions of law and the substitution of its judgment for that of the district court in violation of Rule 52(a).

The appellate court recognized that the "interpretation of contracts under California involves a complex interplay of questions of fact and questions of law" and that the trial court's findings of fact themselves involved in that "complex interplay" are "reviewed under the clearly erroneous standard" (App. A at 9a). Yet, the appellate court in disregard, of and in conflict with, decisions of this court and of the Ninth Circuit, proceeded as though the district court's findings of fact were a nullity because, it asserted, under California law interpretation of a contract is a matter of law. But that does not tell the whole story under California law. Where extrinsic evidence has been properly admitted, as the district court found (App.C at 22a), and the evidence

is in conflict, as in the present case, any reasonable construction (of the MOU) by the trial judge will be upheld under the general rule of conflicting evidence. See Witkin, Summary of California Law, 9th Ed. 1987, Contract §681, at 615, citing *Parsons v. Bristol Dev. Co.*, 62 C.3d 861,866, 44 C.R. 767, 402 P.2d 839 (1965) and *Los Banos Gravel Co. v. Freeman*, 58 C.A. 3d 785, 791, 130 C.R. 180. See also *In re James E. O'Connell, Inc.*, supra, at 1260-1261, ruling that findings of fact "underpinning" the matter of law "will not be overturned unless they are clearly erroneous."

As is clear from the analysis of the appellate court's opinion that follows herein the appellate court has violated Rule 52(a) by ignoring the highly deferential standard of review for findings of fact, by second guessing the district court on the basis of erroneous findings of fact and conclusions of law, and overstepping the bounds of its duty in undertaking to duplicate the role of the district court. *Anderson, supra*, at 573. It is not enough that the appellate court might give the facts another construction, resolve the ambiguities differently, and reach a different conclusion from that of the trial judge, for such a conclusion on the appellate court's part does not make the district court's findings "clearly erroneous." *Strickler v. Pfister Associated Growers, Inc.*, 319 F.2d 788, 790 (6th Cir. 1963); *Anderson, supra*, at 573-574.

II. THE APPELLATE COURT'S REVERSAL OF THE DISTRICT COURT IN VIOLATION OF RULE 52(a) IS BASED ON A MISINTERPRETATION OF THE 1967 AMENDMENTS AND ON OTHER ERRORS OF FACT AND OF LAW

The appellate court's reversal of the district court's decision in violation of Rule 52(a) is based on a misinterpretation of Article 9(b) of the 1967 amendments of Cities' contracts and on other errors of fact and of law. Dismissing the significance of the use of "curtailment" instead of "withdrawal" in Article 9(b) with the bald, unsupported assertion that "curtailment" and "withdrawal" have "the same practical effect" (App.A at 13a, note 4), the appellate

court found that the language of Article 9(b) of the 1967 amendments "is not ambiguous" and is a "straightforward recital of the three stated purposes", authorizing "withdrawal" of Cities' allocations and the allocations of all preference customers in the event power is *insufficient* to serve Cities' load growth (App.A at 12a).

In one sentence, set forth in the footnote,[17] the appellate court presumed to find authority to withdraw Cities' allocations for load level protection.[18] In another sentence set forth below,[19] the appellate court presumed to find authority to withdraw the allocations for project use and the first preference of Trinity, Calaveras and Tuolumne. The appellate court also presumed to find that the district court erred in finding the language of the 1967 amendments reasonably subject to the interpretations of either Cities or Western, asserting that there "is no relevant extrinsic evidence in the record that could alter the meaning of the 1967 amend-

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[17] "To the extent that power and energy is available, said contract rate of delivery shall be increased from time to time to serve the firm load growth of the Contractor [customer] up to the level which the Contractor's firm load reaches in 1980 or until the firm load of all preference customers reaches a simultaneous demand of 1,050 megawatts." (material in brackets supplied).

[18] "Load level protection" refers to the maintenance of deliveries of power to the preference customers within the successive levels of PG&E's obligation under Contract 2948A to provide power to the preference customers sufficient to meet their CRDs, not to power in excess of the CRDs (P.Ex.No.42,pp.17-18).

[19] "The total power and energy available to serve preference agency firm load shall be the power and energy generated at project generating plants that is not required for project operation or for sale either under Section 4 of the Act of August 12, 1955 (69 Stat. 719), or under that portion of Section 201, Title II of the Act of October 23, 1962, pertaining to the San Joaquin River Basin (76 Stat. 1191-1192) as supplemented by power and energy from such other sources as the United States may in its sole discretion provide." The Acts referred to in the quoted definition confer a first preference on preference customers in Trinity, Calaveras and Tuolumne Counties of up to 25 percent of the additional energy generated by the Trinity River Division and New Melones power plants.

ments." (App.A at 13a). The appellate court's findings and conclusions are erroneous.

The appellate court completely misinterpreted Article 9(b) of the 1967 amendments of Cities' contracts. First, "curtailment", is the term used in Article 9(b), not "withdrawal". They do not have the same practical effect as asserted by the appellate court and are not interchangeable as the appellate court assumed. Second, the sentence interpreted by the appellate court as authorizing withdrawals for load level protection has no connection with load level protection and does not authorize withdrawals or curtailments for load level protection or for any other purpose. Third, the sentence relied on by the court as authorizing withdrawals for project use and the first preference of the three counties does not authorize such withdrawals. At least 20 CVP contracts, (identified in App.G at 38a) as hereinafter shown, *infra*, 21-22, lay bare the appellate court's error. The appellate court, also, made a series of erroneous findings of fact and conclusions of law which, unquestionably, contributed to, and made inevitable, the appellate court's erroneous interpretation of Article 9(b) (infra, 24-26). The appellate court's misinterpretation of the 1967 amendments, is also attributable to the appellate court's failure to give heed to the reason for the 1967 amendments, which precludes withdrawals of Cities' allocations (infra, 15-18). The appellate court's decision is barren of any reference to, discussion of, or awareness of, the significance of the reason for the 1967 amendments, described immediately below.

A. Background of the 1967 Amendments

The 1967 amendments had their genesis in 1964. At that time, Western was seeking authority from Congress to construct an extra high voltage ("EHV") transmission facility, known as the Intertie, over which power would be imported from the Pacific Northwest into Northern California to enable Western to increase its sales of power to CVP preference customers. The California Congressional delegation testified before a committee of Congress in opposition to

construction of the Intertie unless Western agreed to provide Cities' future load growth (RT17-18,198,7/23/90; A.E.R. 107; Ex. No. 18, p. 6). Confronted with this opposition, Western agreed to provide Cities' future load growth.[20] (id.)

To carry out the agreement, Western did two things. First, it estimated Cities' future load growth and increased the proposed capacity of the Intertie to enable delivery of that load growth until the maximum simultaneous demand of all CVP customers reached 1050 mw, then (in 1964) anticipated to be reached in 1980 (RT17-18,7/23/90).[21] The estimate of the anticipated 1050 mw included the loads of all of the preference customers, including Cities, *but provided load growth only for Cities and Shasta*[22] (RT133-134, 7/19/90; RT17-19,7/23/90). Second, to insure its ability to carry out its commitment to Cities (thereafter, and still, known as "the load growth customers"), Western negotiated a new support contract with PG&E (Contract No. 2948A) in which PG&E agreed to provide the power required by Cities' and the other preference customer's CRDs until the 1050 mw target was reached and, thereafter, at that level through December 31, 2004, the termination date of the contract (A.E.R.107).[23]

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[20] The term "load", is commonly used in the industry. It refers to the power requirements imposed on the seller's system by its customers. *PUR, Glossary for Utility Management*, Public Utility Reports, Inc. (1992) p. 84). Hence, reference to Cities' "load growth" referred to Cities' increasing load requirements for power as its consumers' "loads" increased.

[21] It is not surprising that an estimate of future load growth made in 1964, and peering 16 years into the future was "overoptimistic" about the level and time of Cities' load growth (P.Ex.No. 14, Memorandum of March 26, 1970, p. 1; Letter of April 27, 1990). As a Western witness wryly testified, referring to the "estimate in 1964 of what the loads were going to be in 1980", ". . . quite often we can estimate the loads next year."(RT18, 7/23/90). At the time of the negotiations the 1050 mw target had not been reached.

[22] Shasta Public Utility District is also a load growth customer.

[23] The appellate court has it backward when it states Cities' contracts were amended in 1967 when Contract No. 2948A was executed. That

Western's Mr. Hine testified (RT35,7/19/90) that the effect of the Intertie legislation enacted by Congress created a group of six customers, Cities, which were entitled to a block of power "*set aside* for that *group as a group* to grow into" until "the sum of those customers equaled the amount that was available," namely, 1050 mw (emphasis supplied). Normally, he testified, the contract is for a fixed amount of power, but Cities are an exception to that norm (RT39, 7/19/90), having, as another Western witness put it, a "special position as load growth customers" (RT17,7/23,/90).[24] Only Cities and Shasta, another Western witness testified, can be described as the "load growth customers entitled to load growth" because only their CRDs "increase *automatically* based on their load." (RT304,306,7/24/90; emphasis supplied). As a result of Western's commitment, "it became the Bureau's policy with respect to the CVP to reserve uncommitted power for the supply of load growth of the then municipal and cooperative preference customers of the project on a firm basis. *Prior to those customers needing the power it would be sold to others on a withdrawal basis*" (A.E.R. 107-108,P.Ex.No. 18).[25]

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contract was negotiated after Western made its commitment to Cities. Contract 2948A and the 1967 amendments to Cities' contracts were executed contemporaneously. That contract requires Western to deliver to PG&E all CVP power generated by its plants and the power imported over the Intertie from the Pacific Northwest *minus the power required for CVP project use* (Orig. 1985 Record, pp. 218-19; RT47, 7/23/90). Consequently, Western has not adopted procedures for withdrawals for project use. Western has stated that so long as it has surplus power in its accounts with PG&E under Contract 2948A or is able to buy power to meet deficits in CVP generation, there is little risk of the necessity for withdrawals for project use and has adopted no rules for such withdrawals (Orig. 1985 Record, p. 269).

[24] Santa Clara in its lawsuit referred to Cities as the "superpreference" customers by reason of their special status (A.E.R 105).

[25] Under the MOU, Santa Clara received not only a 65 mw "nonwithdrawable" allocation but, additionally, received a 60 mw "withdrawable" allocation from unused allocations, such as Cities' load growth, which would be withdrawn as needed by Cities. Santa Clara also had 71.4 mw of withdrawable power from its pre-litigation allotment which was withdrawable for the needs of other customers to which the power had been

Western's commitment to provide Cities' load growth mandated deletion of the provisions from Cities pre-1967 contracts authorizing withdrawals of Cities allocations for project use and the first preference of Trinity County. Obviously, if withdrawals were authorized, Cities would thereby be deprived of power for load growth and of power to meet its customers current requirements because withdrawals permanently reduce the CRDs, at odds with Western's commitment. Therefore, the authorizations for withdrawal were deleted by the 1967 amendments. The appellate court's decision does not address the evidence relating to the 1967 amendments and never attempts to, and if it had, could not square its interpretation of Article 9(b) with Western's load growth commitment to Cities.

Under the appellate court's interpretation of Article 9(b), the withdrawal authorizations were deleted from the 1963 contracts only to be immediately restored by the 1967 amendments in expanded form to include authority for withdrawal for Calaveras and Tuolumne. That makes no sense. As Western's witness agreed on cross-examination, if Cities' power allocations were to remain subject to withdrawal for project use and Trinity County's first preference and, additionally, were to be subject to withdrawal for the first preference of Calaveras and Tuolumne Counties, all that was necessary to accomplish that result was an amendment adding to the existing provision authorizing withdrawal for Trinity County the names of the other two counties (RT114-115,7/20/90).

B. Curtailment Versus Withdrawal

The appellate court's misinterpretation of Article 9(b) is, also, the result of the appellate court erroneously treating Article 9(b) as having used "withdrawal" rather than "curtailment" by wrongly concluding that both terms have the same "practical effect" (App.A at 13a, note 4). First, as Western's witness conceded, when "withdrawal" of power is authorized, the contract *always*, *without exception*, in-

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allocated but was unused, for project use and the first preference of only Trinity County (Orig. 1985 Record at 41-2).

cludes explicit provisions authorizing "*withdrawals*" stating the purpose of the withdrawal, the quantity of the withdrawal, and the advance written notice period that must be given before the withdrawal may be made (RT249-50, 7/24/90). Withdrawal is always referred to as "withdrawal", not as "curtailment". The witness could not recall a single contract where "withdrawal" is intended that does not include such explicit authority (RT251,7/24/90). In fact, the contracts tendered by Western to Cities in 1985, in purported compliance with the MOU, unlike the contracts as amended in 1967 which deleted all authority for withdrawals, included whereas clauses referring to the possibility of "withdrawals" and in the main body of the contract included explicit provisions authorizing "withdrawals" for project use and the first preference of the three counties, utilizing the term "withdrawal", not "curtailment" (Orig. 1985 Record, pp. 186-87; App.H(3) at 49a-50a). Contrary, also, to the appellate court's erroneous statement (App.A at 13a, n.4), that the contracts tendered to Cities in 1985 in purported compliance with the MOU provided for *pro rata* withdrawals, the contracts do not provide for withdrawals on a *pro rata* basis (Orig. 1985 Record, pp. 186-187,App.H(3) at 50a). In fact, none of Western's contracts in existence during the negotiations, provided for "withdrawals" on a *pro rata* basis.

Were "curtailment" and "withdrawal" synonymous, or of the same practical effect, one would expect to find in other Western contracts the use of "curtailment" when "withdrawal" is intended and vice versa, which is not the case.[26] The failure of the appellate court to recognize the distinction between "curtailment"and "withdrawal", which is obvious from the evidentiary record, is largely responsible for the appellate court's misinterpretation of the 1967 amendments, but as we show, *infra*,24-26,other erroneous findings of fact and conclusions of law by the appellate court on

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[26] P.Ex.No. 26, Vols. I and II includes copies of all CVP preference customer contracts in existence at the time of the settlement negotiations. Appendix J identifies the contracts in the order in which they appear in that exhibit.

the way to its misinterpretation of the 1967 amendments in violation of Rule 52(a) made inevitable the appellate court's erroneous interpretation of the provisions of Article 9(b) and the MOU.

"Withdrawal" is not "curtailment" and they do not have the same practical effect. Curtailment involves a "temporary diminution of service" in response to a temporary shortage of supply. *Arkansas Louisiana Gas Co.*, 49 FPC 53, 57 (1973), remanded on other grounds, *sub. nom., Arkansas Power & Light Co. v. FPC*, 517 F.2d 1223 (D.C. Cir. 1975), *cert.denied*, 424 U.S. 933, 47 L.Ed.2d 341 (1976). Curtailment involves a plan for allocating *insufficient* supplies among existing customers, usually *pro rata* in accord with priorities, usually providing the highest priority to residential customers. *International Paper Co. v. FPC*, 476 F.2d 121, 123 (5th Cir. 1973); *American Smelting & Refining Co. v. FPC*, 494 F.2d 925, 936 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 882, 42 L.Ed.2d 122 (1974).[27] When the shortage is overcome, full contract rates of delivery resume *as required by the contractual obligations* which are temporarily put aside, not altered or extinguished by curtailment as they are in the case of withdrawals. In the case of a shortage of supply, necessitating curtailments, all customers suffer temporary diminution of power deliveries regardless of their contractual immunity from withdrawals. Thus, as Western's Mr. Magaw testified (RT202,7/23/90), even SMUD's 290 mw, concededly not subject to "withdrawal" for any reason, is subject to "curtailment". This is not the case with respect to "withdrawals". Only those preference customers whose contracts expressly subject the allocations to withdrawal are affected by withdrawals.

"Withdrawal" is permanent, not temporary, as in "curtailment." Withdrawal reduces the allocation of power and,

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[27] The cited cases are not distinguishable because the curtailments were due to shortages of natural gas whereas CVP curtailments are due to a shortage of power, particularly hydrogenerated, due to drought, or to the result of failure of generation and/or transmission facilities due to earthquakes or other forces.

consequently, the contract rate of delivery stated in the contract. This effect is illustrated by the withdrawals from Santa Clara that generated the 1975 Santa Clara lawsuit.[28] *supra*, 4. Amendments to the contract are submitted by Western to the customers to reflect this effect. Santa Clara consistently refused to sign them prior to its lawsuit.

The General Power Contract Provisions, which are part of Cities' contracts as amended in 1967, leave no room for doubt that "curtailment" is not "withdrawal", in practical effect or otherwise, contrary to the appellate court's assertion and Western's own position. "Paragraph K, Adjustments for Curtailments of Service", provides for billing adjustments in the event of curtailment of service and states in the clearest, non-ambiguous possible terms that "withdrawal of power and energy under contract provisions shall *not* be deemed curtailments to service." (App.F at 36a-37a, emphasis supplied). There are no billing adjustments for withdrawals.

C. The Definition of Total Power and Energy Available

The appellate court also erred in finding that the definition of "total power and energy available to serve the total firm load of all preference agencies" is a "straightforward recital" of two "of the three stated purposes," i.e., authorizing withdrawals for project use and the first preference of the three counties (App.A at 12a-13a). That this analysis of Article 9(b) of the 1967 amendments is erroneous is confirmed by at least 20 contracts in the evidentiary record which Western's witness conceded include a definition similar in format to that in the 1967 contracts (RT361-2; App.G at 38a-39a). The provision, in words and substance, is the same as the provision in Article 9(b) on which the appellate court relied for its erroneous interpretation and substituted its judgment for that of the district court. To illustrate, using Article 11(b) of Western's contract with the

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[28] See, also, the 1965 contract tendered by Western to Cities in purported compliance with the MOU (App.H(3) at 50a-51a). Section 13(d) acknowledges that withdrawals reduce the CRDs (Orig. 1985 Record, p. 187).

Atomic Energy Commission for service to its Lawrence Livermore Laboratory, one of the 20 contracts, dated August 28, 1973, the contract provides at page 5:

> "Power and energy delivered to AEC hereunder is part of the power and energy generated at Project generating plants, as supplemented by power and energy from such other sources as Reclamation may provide, which is not required for project operation or to supply preference customers in Trinity, Tuolumne and Calaveras Counties, California in accordance with the requirements of Reclamation Law."

Immediately following this language, Article 11(b) includes explicit provisions authorizing "withdrawals" for project use and the first preference of Trinity County, as Western's witness admitted (RT360-362,7/24/90; P.Ex.No. 26, Vol. II), as follows:

> The Contracting Officer [the individual executing the agreement on behalf of Western] upon 17 months advance written notice to the AEC may withdraw electric power and energy provided for hereunder up to 25 percent of the 22,800 kilowatt of power and energy from Trinity River Power Plants to supply preference customers in Trinity County . . . . Reclamation may also at the sole discretion of the Contracting Officer reduce the contract rate of delivery for power hereunder by any amount necessary to supply the project use requirements of the Central Valley Project, *Provided*, that Reclamation shall have given written notice to the AEC 17 months in advance of the effective date of such reduction in the contract rate of delivery. (material in brackets supplied).

Clearly, contrary to the appellate court's interpretation, the provision regarded by the appellate court as a "straightforward recital of" authority for withdrawal for project use and the first preference customer was not so regarded by Western. If it were that, the explicit provisions for withdrawal in the Atomic Energy Commission's contract and the 19 other contracts identified in Appendix G at 38a-39a

would have been unnecessary and would not have been included.

D. Load Level Protection

The appellate court also erred in interpreting the second sentence of Article 9(b), *supra*, p. 14, note 17, as authorizing withdrawals for load level protection. That sentence merely describes Western's commitment, made in 1964 and memorialized in Article 9(b) of the 1967 amendments, to provide Cities' load growth "up to the level which Contractor's firm load reaches in 1980 or until the firm load of all preference customers reaches a simultaneous demand of 1,050 megawatts." (D.Ex.No. 502, p. 3). In stating that commitment Western prudently qualified the commitment with the phrase "[t]o the extent that power and energy is available". Although, under Contract 2948A PG&E is obligated to deliver power in sufficient amounts to satisfy Western's obligation to provide Cities' load growth, events beyond the control of either PG&E or Western, such as earthquake, drought, unscheduled failure of generating units or of transmission facilities, could bring about a temporary shortage of power,[29] which, through no fault of Western or PG&E, would prevent PG&E from fulfilling its obligation to provide power for existing CRDs and for load growth, requiring instead *pro rata* "curtailments"—not "withdrawals"—of power. The provision of Article 9(b) relied on by the appellate court serves that function.

When power is insufficient to meet the CRDs of all preference customers, load level protection is irrelevant and is of no concern. Load level protection is necessary only when the availability of power is sufficient to supply the CRDs and, additionally, is sufficient to enable the customers to take power in excess of their CRDs. The appellate court overlooked that important fact. Moreover, when power is

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[29] Contract 2948A is critical to the functioning of the CVP. Without that contract, Western could only sell 450 mw on a permanent basis. It could not support a load of 1050 mw or the increase to 1152 mw provided in the MOU because Western does not have sufficient water at all times to meet that kind of an obligation (RT36,37,7/19/90).

available in sufficient volume to permit excess takes, the preference customer contracts, including Cities' contracts, did not provide for curtailments or withdrawals. They explicitly provided that nothing in the contracts authorizes the customer to take power in excess of the CRDs, and that if excess takes of power occurred, which caused Western to incur a liability as a result of the excess deliveries, the customer agrees to indemnify Western (D.Ex.No. 501, pp. 13 and 14).[30] That is the load level protection provision, not the sentence relied on by the appellate court. It does not authorize either withdrawals or curtailments.

Thus, it is abundantly clear that the appellate court erred in finding that the sentence is a straightforward recital of one of the three stated purposes, namely, load level protection. This error alone undermines the appellate courts' substitute conclusion for that of the district court in violation of Rule 52(a), that Article 9(b) is a straightforward authorization of withdrawal for the *three* stated purposes.

E. The Appellate Court's Additional Violations of Rule 52(a)

Based on a finding that *all* Western power contracts provide authority to withdraw for the three stated purposes, the appellate court erroneously concluded that the MOU, therefore, must have contemplated post-MOU sales contracts would so provide (App.A at 14a). All CVP contracts, however, do not provide for withdrawal for the three stated

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[30] Excess takes of power would cause a liability to PG&E only if they caused PG&E's deliveries of power to exceed the then effective PG&E support obligation. It is unlikely that such liability would occur unless there were excess takes of power by a multiple number of CVP customers which could push the effective simultaneous demand of all customers over PG&E's obligation. Mr. Hine acknowledged that load level protection is different in nature from project use and the first preference in that the simultaneous peak is not predictable. As a result, if that peak is exceeded it is known only weeks after the fact. Consequently, load level protection is handled after the fact. Mr. Hine was hard put to know how it would be handled since it had not occurred. He surmised it was a billing matter (RT114,117,7/19/90; P.Ex.No. 26, Vol 1, City of Palo Alto Contract, Art. 15, p. 13).

purposes, as Western's witnesses conceded when confronted with the contracts. SMUD's 290 mw, for example, is not subject to withdrawal for any reason (RT35, 7/20/90). An additional allocation of 70 mw made by Western to SMUD in 1966 is withdrawable only for project use and the first preference of only Trinity County (RT32-33,7/20/90; RT134-135,7/19/90). Additionally, other contracts contain no provisions for withdrawals, for example, Reclamation 2035 Contract (P.Ex.No. 26, Vol. II) and Arvin-Edison's contract(A.E.R.223-4, P.Ex.No.36 Vol. II). Further, no pre-MOU contract authorizes withdrawals for the three stated purposes. They provide for withdrawal for project use and only the first preference of Trinity County (P.Ex.No.26, Vol. I and II). This is but one of the appellate court's erroneous findings in violation of Rule 52(a) that led it into error in substituting its judgment for the district court's respecting the interpretation of the 1967 amendments and the MOU.

The appellate court also found that Western's ability to sell power is limited by the three stated purposes. This finding is erroneous. It led to the appellate court's erroneous conclusion that "one reasonably would expect the MOU to accommodate this reality", and its rejection, in violation of Rule 52(a), of the district court's determination (App.A at 10a). As Western's Mr. Magaw testified, Western has the authority, and has exercised it,to include some, none, or all of the three stated purposes in contracts, citing the total exemption from withdrawal of SMUD's 290 mw (RT178-179,7/23/90), Western's agreement to exempt 80% of the 65 mw allocation to Santa Clara in the MOU from any withdrawals (RT181-182,7/23/90),[31] and, by rule, West-

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[31] When a new agreement purporting to implement the terms of the MOU was tendered by Western to Santa Clara, Santa Clara objected to the provisions which authorized withdrawals of the 65 mw for the three stated purposes on the ground that under the MOU the 65 mw was not subject to withdrawal for any reason. Western contractually agreed that 80% of the 65 mw would not be subject to withdrawal for any reason, i.e., would be "nonwithdrawable" as described in the MOU(RT181-82,288, 7/24,25/90).

ern's exemption of 80% of all CVP preference customers allocations from any withdrawals. Mr. Magaw testified that Western has a variety of ways to meet the first preference and project use. (Id.) Further, nothing in the statutes authorizing the first preference specifies the manner in which the first preference is to be satisfied and does not mandate withdrawals therefor (App.D&E at 31a and 33a).[32]

Frequency of use in the MOU of certain terminology does not suggest a specialized meaning unique to the MOU, as the appellate court erroneously found, singling out "present nonwithdrawable customers" (App.A at 10a). "Nonwithdrawable" appears only 7 times, "present nonwithdrawable customers" appears only 5 times, and "withdrawable" appears most frequently, 16 times, all due simply to the organization of the MOU, as even a cursory examination of the MOU reveals. As for the appellate court's implication of significance in the use of "nonwithdrawable" in the phrase "present nonwithdrawable customers," (App. A at 10a), the significance is that, contrary to Western's contention that the phrase refers to all preference customers, only Cities and Shasta are identified as the "present nonwithdrawable customers" (E.R. at 141[33]), *as Western's Hine and Magaw conceded* (RT3-4,7/20/90; Magaw Depo.193-195).

In the Mutual Release, Santa Clara agreed not to challenge any future withdrawals of power from its withdrawable power allocations to satisfy the present nonwithdrawable CVP customers' contractual rights as set forth in Paragraph 8 of the MOU. That paragraph of the MOU identifies the contract rights of Cities and Shasta to purchase its allocations on a "nonwithdrawable" basis.

The result of the appellate court's second guessing of the trial court and violation of Rule 52(a) is startlingly and clearly erroneous. The appellate court, in effect, has ruled

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[32] The record discloses that the total power requirements of the first preference customers in the three counties even by 1985 was a mere 15.5 mw (Orig. 1985 Record, p. 264).

[33] "E.R." refers to Appellants Excerpts of the Record in the appellate court.

that "curtailment", "withdrawable" and "nonwithdrawable" all mean subject to withdrawal for the three stated purposes.

Cities submit that contrary to the appellate court's assertion (App.A at 13a) that there is no relevant extrinsic evidence in the record that could alter the appellate court's interpretation of the 1967 amendments, as shown herein, the relevant extrinsic evidence which contradicts this assertion is overwhelming.

III. UNDER THE APPELLATE COURT'S INTERPRETATION OF THE 1967 AMENDMENTS OF CITIES' CONTRACTS IN VIOLATION OF RULE 52(a) ONLY CITIES ARE WITHOUT ANY BENEFIT UNDER THE MOU, AND ARE SUBJECTED TO DETRIMENT

The appellate court rejected Cities' contention that Western's interpretation of the MOU, adopted by the appellate court, deprives only Cities of any benefit under the MOU and leaves Cities only with a detriment.[34] App.A at 14a. The alleged benefits described by the appellate court are non-existent. *Id.*

As one benefit, the appellate court asserts that Cities have the ability to grow into their allocations of power specified in the MOU without a wasteful race to compete for load growth that characterized the arrangement prior to the MOU (App.A at 14a). To speak of a race for load growth among Cities of diverse locations, size, population, and economic circumstances that bear on load growth is hyperbole. Under no circumstances could Biggs, for ex-

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[34] Santa Clara received a 65 mw allocation of power which under the decision of this Court (572 F.2d 660, 667-8 (1978)) it could not secure in the remand proceedings, the right to 60 mw of withdrawable power, and $10,000,000 of the escrow fund (Aghjayan Depo., pp. 83-84, 7/26/89). PG&E received $75,000,000 of the escrow fund and the right to continue to purchase surplus low cost CVP power without challenge from Santa Clara (Aghjayan Depo., pp. 85-86, 7/26/89). Western received an increase of 102 mw of support from PG&E under Contract 2948A which Western had wanted for its own benefit and secured PG&E's agreement to negotiate with Western the settlement of matters between them that Western wanted to settle, unrelated to the *Santa Clara* case.

ample, the smallest of the group, engage in a race for load growth with, for example, Roseville.[35] The reference to a race is colorful, but there was no race prior to the MOU, wasteful or otherwise, among Cities for load growth. There was recognition, however, that in light of the varying prospects for load growth, as is evidenced by the different amounts of load growth assigned in the MOU to Cities from the load growth remaining at the time of the negotiations, a specific allocation of power for load growth was advantageous. Finally, on this point, if the allocations are subject to withdrawal Cities cannot be secure that the respective allotments will be there to grow into at their own pace, as the appellate court assumed.

Another benefit perceived by the appellate court is based on its misreading of the 1978 decision of the Ninth Circuit in *Andrus*, *supra*. Under *Andrus*, the appellate court asserted, Western had complete discretion to sell all of Cities' allocations of power to other preference customers, leaving Cities without any CVP power. The appellate court concluded, on this reading of *Andrus*, that the MOU spared Cities the loss of all of their power allocations and instead granted Cities the right to "purchase *guaranteed* amounts of CVP power, subject only to the same withdrawals for the three stated purposes that characterized *all* of Western's typical pre-MOU sales contracts." (emphasis supplied; App.A at 14a). But *Andrus* did not rule that Western has complete discretion to deprive Cities, or any preference customer, of their right to the power committed under contract to them by Western. *Andrus* ruled only that Western has complete discretion to allocate power *contractually uncommitted* but available for allocation at Western's discretion (572 F.2d at 667, 668). Consequently, the appellate court in violating Rule 52(a), erroneously asserted that Cities were

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[35] Biggs' population is 1,679; its service area is less than 1 square mile. It has a total of 621 customers of which 575 are residential and the rest are small commercial customers. Roseville's population is 53,816, its service area is 29.2 sq. miles. In 1992-3 it had 24,597 customers of which 3,086 were commercial/industrial, some of which are very large, employing thousands (App.K at 60a).

spared the unfavorable outcome of loss of all of their CVP power. Cities existing allocations were not in jeopardy.

The appellate court also violated Rule 52(a) in asserting that Cities were awarded rights to purchase "guaranteed" amounts of power, while at the same time (App. A at 14a) asserting the power was subject to withdrawals for the three stated purposes. Power that is subject to withdrawal can hardly be described as "guaranteed" power. Nor can such power be described as power Cities could "count on", as Western in hailing the settlement described Cities' allocations under the MOU (A.E.R.205, 211). When allocations are subject to withdrawal, the preference customer's ability to plan its power needs and to market the power, particularly for industrial uses, is impaired. The ability to attract industrial customers, particularly, depends upon the sellers' ability to provide long term assurance to the industrial customer of the availability of the power and at an advantageous cost to the industrial customer.

The appellate court also wrongly concluded (App.A at 14a) that in all of Western's typical contracts the power allocations were subject to withdrawal for the three stated purposes. None of the 20 contracts provides for withdrawals for the three stated purposes nor, in fact, did any of the contracts that were in existence at the time of the negotiations (*supra*, 21-22, 25; P.Ex.No. 26, Vols. I and II).

In addition to depriving Cities of the only benefit Cities received in relinquishing 65 mw of Cities' load growth,which had a value of not less than $100,000,000[36] over the remaining 24 years of Cities' contracts, the appellate court ignored the detriment in increased cost of power to Cities because of Western's insistence that PG&E increase its support obligation by 102 mw to permit Western for its own purposes, admittedly outside of the issues of the lawsuit, to provide allocations of power to five cities that were not customers of Western and had agitated for CVP power

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[36] PG&E placed the value of the 65 mw at between $182 to $273 million (P.Ex.No. 23, p.2).

allocations. That increased cost of power, estimated at $1,698 million by Western's witness Hine will be borne, Mr. Hine stated, by existing CVP customers as well as new customers (P.Ex. No. 27, p. 14).

An interpretation of the MOU that has such irrational results and attributes such irrational conduct to Cities, leaving Cities only with detriment as its *quid pro quo* for relinquishing 65 mw of valuable load growth which Cities were not in jeopardy of losing, and making the settlement of the lawsuit possible, is untenable. Cities held the key to settlement. Cities would not have given up 65 mw without insisting that its allocations were not to be subject to withdrawal for any reason, even if its allocations were not already "nonwithdrawable" as they have been since 1967.

CONCLUSION

The appellate court's decision not only is riddled with errors of fact and of law, committed while violating Rule 52(a), it is, beyond argument, the decision is in conflict with decisions of this Court and of the appellate court's own circuit respecting the proper function of an appellate court under that rule.

The violation of Rule 52(a) has unjustly deprived only Cities of their only benefit of the settlement, and has sanctioned a breach of a solemn agreement made by Western in 1964, memorialized in the 1967 amendments, that Cities' load growth CVP power allocations would not be subject to withdrawal for any reason. That sole benefit were the specific allocations for each of Cities from their remaining nonwithdrawable load growth allocation. The benefit is denied Cities by the appellate court's ruling that Cities' allocations of power are subject to withdrawal for load level protection, project use and the first preference of those Counties, violates Rule 52(a), and does so on the basis of errors of fact and of law as shown in this petition.

Petitioners submit that their petition for a writ of certiorari should be granted and the decision of the appellate court, so clearly in violation of Rule 52(a), should be summarily reversed.

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